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BEFORE THE ENVIRONMENTAL APPEALS BOARD  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
WASHINGTON, D.C.

In the Matter of )

Star-Kist Caribe, Inc. )

Petitioner )

NPDES Permit No. PR0022012 )

NPDES Appeal No. 88-5

STATUS REPORT

On March 12, 1992, Environmental Appeals Judge Ronald J. McCallum ordered Petitioner (EPA Region II) to submit a status report on whether the circumstances giving rise to the September 4, 1990 Stay Order still exist and on the steps Petitioner and the Office of Water have taken to address the issue.

Specifically, Petitioner was directed to submit by April 3, 1992

a:

detailed status report on the Agency's efforts to develop guidance for the States respecting implementation of the Administrator's Order, and on any subsequent changes in the laws, policies, and permit programs of the States that would affect their respective abilities to implement the Order.

A. Status of Agency Guidance

The Supplemental Information submitted on August 24, 1990, described the progress in developing agency guidance through that date. Following that date, agency staff continued to work on the draft guidance. However, the guidance has not yet been issued in final form, for several reasons.

The plan of the Criteria and Standards Division ("CSD," now part of the Standards and Applied Science Division, Office of Science and Technology) in the summer of 1990 was to issue the guidance (once its terms were final) as part of the preamble to proposed amendments to the water quality standards regulations. Those amendments were then going through the clearance process to go into Red Border review. This procedure offered the advantages of wide public dissemination of the guidance, an opportunity for public comment, and an emphasis on the relationship between schedules of compliance for water quality-based effluent limitations and State standards programs. Concurrently, CSD staff were working with staff from the Office of Water Enforcement and Permits (now Office of Wastewater Enforcement and Compliance), to produce a stand-alone version of the guidance for easy distribution.

However, before that proposed rulemaking or the stand-alone version could be finalized, work on them was temporarily suspended to make staff available to work on other more pressing matters pursuant to the 1987 Amendments to the Clean Water Act. These included the Office of Water's need to identify States which had failed to promulgate numerical criteria for toxics as required under section 303(c)(2)(B) and to propose and promulgate Federal criteria in their stead. This major undertaking resulted in a proposal to promulgate water quality criteria for 22 States on November 19, 1991. 56 Fed. Reg. 58420. That rule is expected to be promulgated in final form in approximately a month. In

addition, the Office of Water has developed application regulations to implement the storm water program on November 16, 1990 (55 Fed. Reg. 47990), as revised March 21, 1991 (56 Fed. Reg. 12098), November 5, 1991 (56 Fed. Reg. 56548) and April 2, 1992 (57 Fed. Reg. 11394). The Office of Water has undertaken numerous activities to assist the States in implementation of the storm water program, including assumption of general permits authority. In addition, the Office was responsible for developing a complex regulation implementing the 1987 statutory amendments to the NPDES program, which is likely to be proposed in the next one to two months, as well as regulations governing the treatment of Indian tribes as States (final water quality standards regulation on December 12, 1991 (56 Fed. Reg. 64876) and proposed NPDES regulation on March 10, 1992 (57 Fed. Reg. 8522). As a result of these competing demands on staff, the draft guidance remains unpublished.

However, the Office of Water, as well as the Office of General Counsel and the Regions, in their oversight capacity, have worked with the States to make clear their intentions with regard to schedules of compliance, and to modify their standards or implementing regulations to make those intentions explicit, where necessary. In addition, as part of the Great Lakes Water Quality Initiative, EPA has helped draft language which will ensure that a proper regulatory basis exists for schedules of compliances for water quality based effluent limitations in the

Great Lakes States. The results of those efforts are described below, State by State.

B. Changes in State laws, policies and permit programs

As explained in the affidavit submitted to the Administrator on August 24, 1990, following issuance of the March 8, 1989, and April 16, 1990, Orders in this case, the Office of Water, in concert with the Regions, took steps to bring those orders to the attention of their State counterparts. Through their normal NPDES and water quality standard oversight efforts, the Regions have continued to work with the States to ensure that the States' laws, regulations and standards reflect their intentions with respect to schedules of compliance in NPDES permits for effluent limitations based on post-July 1, 1977 water quality standards (hereinafter referred to as "schedules of compliance for post-1977 standards"). The following sets out our current understanding of the status of each State in this regard.

Several States have incorporated provisions into their water quality standards or related regulations which explicitly authorize schedules of compliance for effluent limitations based on post-July 1, 1977 standards.<sup>1</sup> These States are Arkansas, Texas, New Mexico, Wisconsin, Mississippi<sup>2</sup>, Alabama<sup>2</sup>/,

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<sup>1</sup>We were not able to reliably determine in all cases whether these provisions were adopted in response to the Star-Kist Orders or were pre-existing. Therefore, this Status Report lists States according to their present status.

<sup>2</sup>. For certain states which have explicitly authorized schedules of compliance for post-1977 standards, we have not been able to verify by the deadline for this Status Report which regulation(s), NPDES or standards, sets forth the authorization.

Florida<sup>2</sup>/, Georgia<sup>2</sup>/, South Carolina<sup>2</sup>/, North Carolina<sup>2</sup>/, Kentucky<sup>2</sup>/, Tennessee<sup>2</sup>/, Maryland<sup>3</sup>, West Virginia<sup>3</sup>/, Colorado, Wyoming<sup>2</sup>/, Montana<sup>2</sup>/, North Dakota<sup>2</sup>/, South Dakota<sup>2</sup>/, Guam<sup>2</sup>/, Missouri, Arizona, and California.

Several other States have begun, but not yet completed, the process for changing their standards or implementing regulations to provide for schedules of compliance. These States include New Jersey, Puerto Rico, Delaware, Virginia, Oklahoma, and Oregon (Oregon is only in the preliminary stages of considering such a change; it has not yet proposed any regulatory change).

A number of States have provisions which, while set out in their permit regulations programs, nonetheless express a State's intention to allow schedules of compliance for post-1977 standards as well as for technology-based requirements. Such provisions would appear to meet the April 16th Order, if permit regulations are deemed to be implementing regulations. These States include New York, Pennsylvania, Hawaii, Iowa, Kansas, and Nebraska. (The States listed in the text at footnote 2 may actually belong here.)

Some States have no explicit authorization for schedules of compliance for post-1977 standards, and no plans to add such authorization. In some cases, this appears to reflect a State decision not to allow such schedules. States in this category include Maine, Massachusetts, New Hampshire, Connecticut, Rhode

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<sup>3</sup> While Maryland and West Virginia believe that they have such provision, the Region has raised questions about their adequacy.

Island, Vermont, and Illinois (latter has statutory impediment). In other cases, there is some uncertainty as to the State's intentions. Such States include the Virgin Islands, Washington, Alaska, Idaho, Indiana, Michigan, Minnesota, Ohio, Louisiana, Nevada, Commonwealth of the Northern Mariana Islands, and the Pacific Trust Territories.

In sum, the States have made progress in making their regulations and standards more explicit as to whether, and if so under which circumstances, schedules of compliance are consistent with their water quality standards. In the majority of cases, it appears that States do intend to allow them under at least some circumstances. However, a number of states still have pending rulemakings or have not made their intentions clear.

Respectfully submitted,

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Dated: April 3, 1992